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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

No. .....

74-779

RUTH LEE DOW,

Petitioner,

vs.

JOSEPH E. CONNELL; KARMA FASHIONS; EDGAR C. HYMAN CO., INC.; ARNELLE OF CALIFORNIA; and SHEDRAIN UMBRELLA COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

Supreme Court of the United States

No. .....

RUTH LEE DOW,

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JOSEPH E. CONNELL; KARMA FASHIONS; EDGAR C. HYMAN CO., INC.; ARNELLE OF CALIFORNIA; and SHEDRAIN UMBRELLA COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Ruth Lee Dow petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, No. 553-70, cited as *Dow* v. *Connell*, 448 F. 2d 763, (1971).

Opinion Below

A copy of the opinion of the United States Court of Appeals for the Tenth Circuit is annexed hereto, together with advice of Order denying Petition for Rehearing.

Statement of Jurisdiction

The opinion of the United States Court of Appeals for the Tenth Circuit was filed on August 3, 1971. Petition for

Rehearing was denied on September 13, 1971. The jurisdiction of this Court is invoked under 28 U.S. Code, Section 1254 (1).

Question Presented

Whether manufacturing companies are responsible for the torts of their salesman in the field; and whether, under the circumstances of this case, the trial Court erred in refusing to apply the doctrine of respondeat superior to the Defendant manufacturing companies and in directing a verdict in their favor and dismissing them from the action.

Statement of the Case

This is a diversity case.

On March 29, 1967, at about 11:45 p.m., in Pitkin County, Colorado, on Colorado State Highway #82, about one mile East of the town of Basalt, an automobile operated by Joseph E. Connell struck Ruth Lee Dow, causing her very serious, permanent, near-fatal injuries.

Before the collision, Connell had consumed alcoholic beverages. At the time and place of the collision, Connell's automobile was traveling on the wrong side of a two-lane road. After the collision, Connell stopped momentarily, then continued on without giving aid. He was apprehended in Glenwood Springs, and after some questioning, first denied and then admitted that he had been involved in the collision.

At the time of the collision, Connell was representing and engaged in selling in this territory the lines of four manufacturing companies. After commencement of this action against Connell as the original Defendant, the four

manufacturing companies were joined as additional Defendants, and the complaint was amended accordingly.

Throughout the trial Court proceedings, Dow asserted and produced evidence that at the time of the collision, Connell was a representative, servant, agent and employee of the companies, that he was engaged in business in behalf of and in the interest of the companies, that he then and there was acting in furtherance of their business and within the scope and course of, and incidental to, his employment by the companies, and that, accordingly, by reason of the rule of respondeat superior, each of these additional Defendants was responsible for the negligence of Connell and the resulting injuries and damages suffered by Dow.

Trial was to a jury. At the conclusion of all of the evidence, the Court granted the additional Defendants' Motion for a directed verdict, and, accordingly, dismissed the complaints as to them. Thereafter, the jury returned a verdict in favor of Dow and against Connell in the amount of $50,000.00, upon which the Court entered judgment. Dow appealed to the United States Court of Appeals for the Tenth Circuit from the judgment of dismissal of all Defendants except Connell and from the final judgment entered on June 15, 1970. The Court of Appeals affirmed the trial Court; hence, this Petition for Writ of Certiorari.

ARGUMENT

Manufacturing companies are responsible for the torts of their salesman in the field; and, under the circumstances of this case, the trial court erred in refusing to apply the doctrine of respondeat superior to the defendant manufacturing companies and in directing a verdict in their favor and dismissing them from the action.

Connell, essentially a traveling salesman engaged to sell the lines of the four Defendant manufacturing companies, was an employee of these companies within the meaning of the rule of respondeat superior.

Connell was simply a traveling salesman engaged to sell the lines of these companies. He sold goods by sample, took orders on the companies' order forms for a quoted price, and sent the orders directly to the companies which delivered the goods and billed the customers.

Connell was engaged in representing and selling the lines of these—and only these—manufacturing companies in the Rocky Mountain territory. He was the only representative of these companies in this territory, and he spent all his business time engaged in selling their lines. His work as a salesman for these companies was part of their general business of distributing their lines for sale in this territory. He had been engaged in selling their lines for some time, and on a continuing basis.

The manufacturing companies in varying degrees enjoyed the right to certain control and supervision of Connell. The companies gave Connell lists of accounts. Edgar C. Hyman Co., Inc. gave Connell general directions or suggestions with respect to sales activities and, occa-

sionally, specific directions and suggestions concerning given accounts; it would advise Connell of sales which were made in his territory. Connell, for his part, periodically would furnish this company with information concerning his sales and activities. Shedrain Umbrella Company offered Connell suggestions from time to time and kept him advised of all correspondence from the home office of customers in his area, as well as relaying to Connell information concerning potential customers. This company furnished Connell its order forms on a regular basis. Arnelle of California kept Connell advised of sales line and delivery rates and discussed with him customers in his territory. Karma Fashions, in its answers to interrogatories, denied any control or right of control over Connell or his activities during the time in question, to which Dow states that "answers to interrogatories must be complete, explicit, and responsive. 'Any evasive answer by either party would probably justify the Court in viewing with suspicion contentions of the party so answering' ". Moore's Manual, Federal Practice and Procedure, Section 15.04 (9) and cases cited therein.

Any of the manufacturing companies, or Connell, could, at any time, without liability, terminate their respective relationships. The right to terminate the relationship at will and without liability is an important factor to consider in determining whether an employee is a servant within the meaning of the rule of respondeat superior. That the right to terminate at any time is an important criterion and strongly indicates the relationship of master-servant is clearly set forth in *Bush Bros. & Co.* v. *Hickey*, 6 Cir., 223 F. 2d 425 (1955), where the Court stated that the legal right of an employer to terminate the employee at any time is a strong circumstance tending to show subserviency of

the employee and no single fact is more conclusive that the status of the parties is that of master and servant. See also 56 C.J.S. Master and Servant, Section 3 (5) and cases cited at Pocket Part Footnotes; 41 Am. Jur. 2d Independent Contractors, Section 19.

Connell cannot be said to have been carrying on a distinct, independent occupation or business. He had no distinct calling, no particular independent skill, learning, or expertise of the nature that often characterizes one as an independent contractor, or broker, where, for example, one, in the exercise of an independent occupation, contrats to accomplish a specified piece of work for a fixed, agreed price. The independent contractor or broker relationship simply is not present under the facts and circumstances here. See, 41 Am. Jur. 2d Independent Contractors, Section 18.

In determining whether the master-servant relationship exists, each case must be decided on its own facts and circumstances, and, indeed, upon the totality of the circumstances; no one feature of the relationship is determinative. All must be considered. Standards for determining whether the master-servant relationship exists in any given situation are set forth in Restatement, Agency 2d, Section 220 (2) and with particularity in 56 C.J.S. Master and Servant, Section 3 (2).

The rule of liability upon which this case rests is well stated in 3 Am. Jur. 2d Agency, Section 267:

> "The well settled general rule is that a principal is liable civilly for the tortious acts of his agent which are done within the course and scope of the agent's employment. However, this rule is not grounded on agency principles, which is evident from the holdings that a principal may be held for his agent's tort com-

> mitted in the course and scope of the agent's employment even though the principal does not authorize, ratify, participate in, or know of such misconduct, or even if he forbade or disapproved of the act complained of. . . . Fundamentally, and according to both the Restatement and the American Courts, there is no distinction to be drawn between the liability of a principal for the tortious act of his agent and a liability of a master for the tortious of his servant. In both cases, the tort liability is based on the master and servant, rather than any agency principle; the liability for the tortious act of the employee is grounded upon the maxim of 'respondeat superior' and is to be determined by considering, from a factual standpoint, the question whether the tortious act was done while the employee, whether agent or servant, was acting within the scope of his employment."

This case falls squarely within the very policy and purpose of the rule of respondeat superior:

> "What has emerged as the modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise which will, on the basis of all past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates, or liability insurance, as to the public,

and so shift them to society, to the community at large. . . ."

Prosser, Law of Torts, 3rd edition, 1964, page 471.

Here, the policy and purpose of the rule of respondeat superior, as authoritatively expressed above, has clear application. It is the manufacturing companies who sent Connell into the field. They stood to profit thereby. Were it not for them and their agreement with Connell for him to represent them and to sell their lines, he would not then have been there. Connell's travels in this territory were for the specific purpose of selling the lines of these companies, and none other. They sent him into this territory, furnished him with order forms, customer account information and lists, business cards, and samples. Essentially, it was the companies that put him into this territory as their representative in furtherance of their commercial activities.

The close association of Connell with these companies, particularly with Edgar C. Hyman Co., Inc., tends clearly to confirm the master-servant relationship. Surely, a commercial enterprise ought not be permitted to insulate itself from an employer's vicarious liability simply by utilizing the pro forma device of manufacturer's representative to sell its lines. The Court must look through form to substance. Connell was a salesman. He represented the manufacturing companies on a continuing basis. He was in the territory in behalf of these companies to sell their lines. The companies derived a direct economic benefit from Connell's activities there and must be considered to have assumed the risk (cost) of doing business in this territory. It is these four manufacturing companies that should be called upon to answer for the tort committed by their salesman during a business trip in their behalf.

Almost a century ago, in *Bank of Kentucky* v. *Adams Ex. Co.*, 93 U.S. 174, 182 (1876), Mr. Justice Strong stated:

> "That it (the railroad company) was the agent of the defendants is quite clear. It was employed by them, and paid by them. The service it was called upon to perform was a service for the defendants. . . . It is true, the defendants had . . . no control over the Company or its servants: but they were its employers; presumably they paid for its service; and that service was directly and immediately for them. Control of the conduct of an agency is not in all cases essential to liability for the consequences of that conduct. If anyone is to be affected by the acts or omissions of persons employed to do a particular service, surely it must be he who gave the employment. Their acts became his, because done in his service and by his direction . . ."

And in *Gleason* v. *Seaboard Airline R. Co.*, 278 U.S. 349, 356 (1929), Mr. Justice Stone well stated the general principle of respondeat superior as follows:

> "And we think that the restriction of the vicarious liability of the principal adopted by the court below is supported no more by reason than by authority. Undoubtedly, formal logic may find something to criticize in a rule which fastens on the principal liability for the acts of his agent, done without the principal's knowledge or consent and to which his own negligence has not contributed. But few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own (citations). The tendency of modern legislation . . . and of judicial decision as well, has been to enlarge rather than curtail the rule."

The principles enunciated in these United States Supreme Court cases have been followed faithfully by Federal and State Courts for many, many years; and this Court ought not now sanction such an egregious departure therefrom as has thus far occurred in the case at bar.

Here, a consideration together of the facts and circumstances and applicable legal standards clearly indicates that Connell was an employee of the manufacturing companies within the meaning of the rule of respondeat superior, or, at least, that the determination of the true status of the parties is one upon which reasonable men can indeed differ and, accordingly, the matter should have at least been submitted to the jury for its determination. Ordinarily, this is a jury question; the Court was not justified in taking such question from the jury, particularly with respect to Edgar C. Hyman Co., Inc., against whom Dow most clearly made a prima facie case. Both in Federal Courts and in Colorado Courts, evidence and inferences that may fairly be drawn therefrom must be considered in a light most favorable to the party against whom a motion for directed verdict is directed, and if reasonable men in the exercise of fair and impartial judgment may reach different conclusions in relation to the critical issue, the motion should be denied and the issue submitted to the jury. *Long* v. *Clinton Aviation Co.*, 10 Cir., 180 F. 2d 665 (1950). It is only in the very clearest cases, when facts are undisputed, and it is plain that reasonable men can draw but one inference therefrom, that a particular question is one of law for the trial Court to resolve, and where evidence presents controverted issues of fact, it is error to direct a verdict. *Little Thompson Water Association* v. *Strawn*, Colo., 466 P. 2d 915. The trial Court may direct a verdict only when there is no substantial conflict in the evidence and where the evidence introduced is susceptible to only one interpretation by reasonable men. *Liber* v. *Flor*, 160

Colo. 7, 415 P. 2d 322. See also, Blashfield, Automobile Law and Practice, Section 252.22, cases cited at Footnote 30.

In *Nattens* v. *Grolier Society*, 7 Cir., 195 F. 2d 449 (1952), an action for damages for the death of a pedestrian who was struck by Defendant's motor vehicle while crossing a street intersection, it was held that evidence that the driver was employed by the Defendant company, that when he was hired he was required to have an automobile, was furnished a sample case which included advertising matter, sample books, and orders for him to fill out on behalf of the company, that he obtained through the company names of prospects or leads, and was furnished credentials indicating that he represented the company in connection with the sale of books, and that on the night of the accident he was returning to his home after having kept an appointment in connection with the company's business, presented a question of fact for the jury whether the driver was acting as an agent of the Defendant company or was an independent contractor.

In *Schumacher* v. *Rosenthal*, 7 Cir., 226 F. 2d 946 (1955), a strikingly similar case, it was held that whether an automobile owner, taking orders for hats at prices set by the manufacturer and receiving commissions on sales by him while traveling in states constituting the territory allotted to him by the manufacturer, was the manufacturer's agent in operating an automobile at the time of collision with another automobile while he was returning home from the manufacturer's sales meeting, attendance at which was not obligatory, was a question of fact for the jury in an action against the manufacturer based on the doctrine of respondeat superior.

Clearly, as set forth in the foregoing cases, whether one is an employee or an independent contractor is ordinarily a jury question, and this case is no different.

In the trial of this action, the Court had before it the answers to interrogatories of all four manufacturing companies, at least one of which, that of Edgar C. Hyman Co., Inc., candidly revealed the relationship between the company and its representative Connell. To this was added the testimony of Connell himself. We thought then, and we still do, that there was sufficient evidence coming from the Defendants themselves to warrant the Court in holding, as a matter of law, that the doctrine of respondeat superior should apply, or, at the very least, that there was sufficient evidence coming from the Defendants themselves, particularly Edgar C. Hyman Co., Inc., to permit the matter to go to the jury as a question of fact for their determination; of that there can hardly be any doubt.

To date, this case has been decided in a way in conflict with other courts, both State and Federal, and with the applicable decisions of this Court. The Trial Court, in arrogating to itself the determination of a critical and controverted issue of fact, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. To date, this case has been decided in a manner that represents a significant regression of the doctrine of respondeat superior. Dow is here contending for a rule that the United States Supreme Court laid down many, many years ago, and which it and the other Federal Courts have faithfully followed, that is until this case was decided in the United States District Court for the District of Colorado and affirmed by the United States Court of Appeals for the Tenth Circuit. It is just as important for this Court to compel the Federal Circuit and District Courts to follow faithfully the rules of law in mundane matters to the same extent that it does in the more recent cases involving critical Federal and Constitutional issues, which cases are more in the judi-

cial limelight, yet no more important to the litigants themselves.

Therefore, it is necessary and indeed appropriate for the United States Supreme Court to resolve the very serious question presented herein, and, for these reasons, a writ of certiorari should be issued to review this case.

Respectfully submitted,

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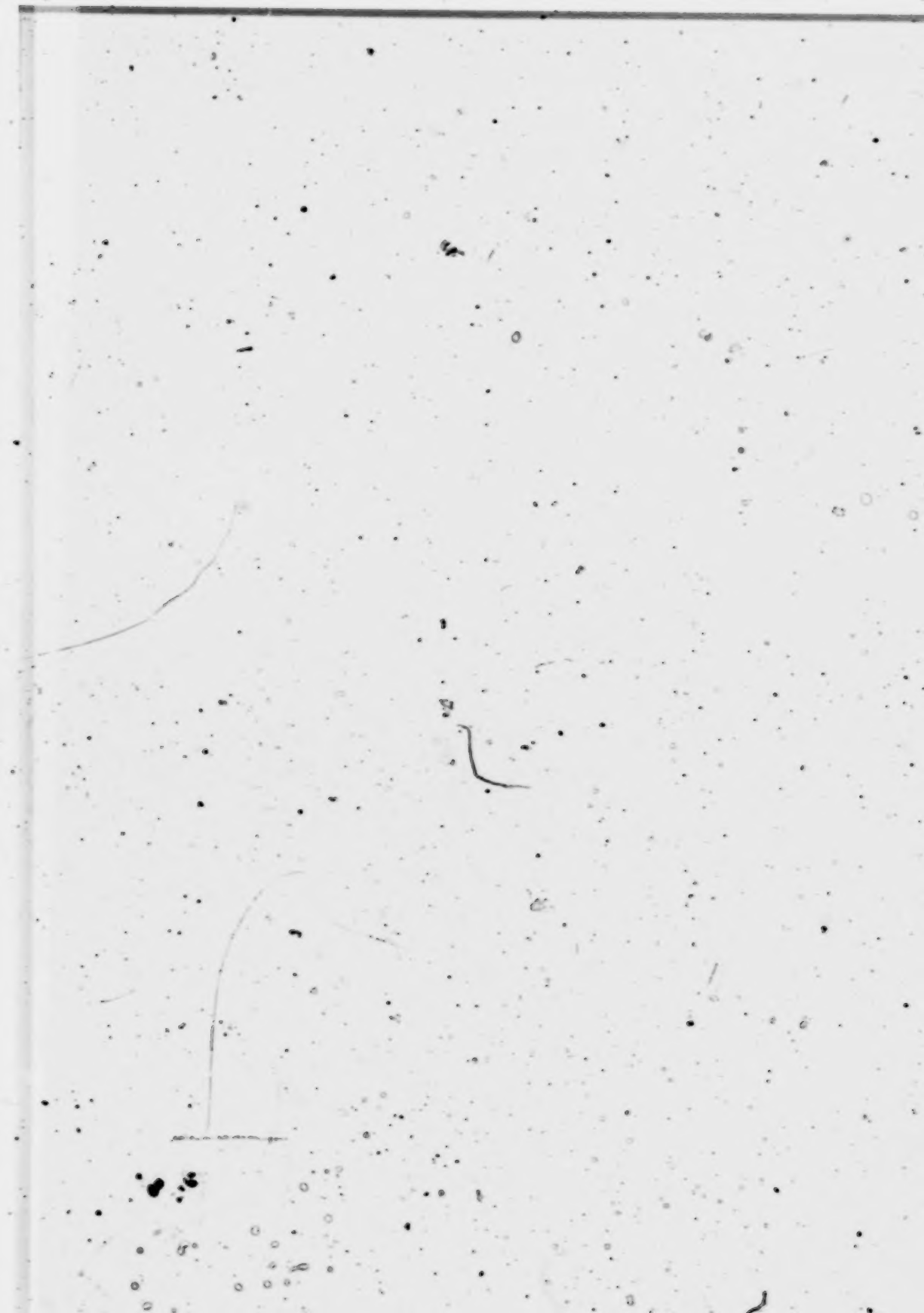
By Wilbur E. Dow Jr.
Attorneys for Petitioner

Certificate of Mailing

I, WILBUR E. DOW, JR., certify that on .....,
1971, I mailed copies of the foregoing Petition for Writ of Certiorari to Richard W. Laugesen, Jr., Wormwood, Wolvington and Dosh, 6780 East Hampden Ave., Denver, Colorado, and to George Allen, Sheldon, Bayer, McClean and Glasman, 622 American National Bank Building, Denver, Colorado, 80202.

.....

APPENDIX



Denial of Petition for Rehearing

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT
OFFICE OF THE CLERK
DENVER, COLORADO 80202

HOWARD K. PHILLIPS
CLERK

TELEPHONE
303-837-3157

September 13, 1971

Re: No. 553-70, Ruth Lee Dow, vs.
Joseph E. Connell, et al.

Mr. Michael B. Lavinsky
Attorney at Law
105 Fillmore Street, Suite 304
Denver, Colorado 80206

Dear Mr. Lavinsky:

An order has been entered today granting leave to file appellant's petition for rehearing out of time and denying said petition for rehearing.

Yours very truly,

HOWARD K. PHILLIPS, *Clerk.*

By /s/ HELEN R. BARTHA
Helen R. Bartha
Deputy Clerk.

hkp:hb
cc: Richard W. Laugesen, Esq.,
810 Symes Bldg.,
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George Allen, Esq.,
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Opinion of Circuit Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 553-70—JULY 1971 TERM

RUTH LEE DOW,
Appellant,

v.

JOSEPH E. CONNELL;
KARMA FASHIONS;
EDGAR C. HYMAN CO., INC.;
ARNELLE OF CALIFORNIA, and
SHEDRAIN UMBRELLA COMPANY,
Appellees.

Appeal from the United States District Court for the District of Colorado (D.C. #67-C-318)

Wilber E. Dow, Jr. (Michael B. Lavinsky, Denver, Colorado, on the Brief), for Appellant.

Richard W. Laugesen, Denver, Colorado (Wormwood, Wolvington and Dosh, Denver, Colorado; Sheldon, Bayer, McLean and Glasman, and George M. Allen, Denver, Colorado, with him on the Brief), for Appellees.

Before SETH, COFFIN,* and DOYLE, Circuit Judges.

*Of the First Circuit, sitting by designation.

Opinion of Circuit Court

SETH, Circuit Judge.

This case began as a personal injury action brought by Ruth Lee Dow against Joseph E. Connell in the United States District Court for the District of Colorado. The issue on appeal is the correctness of the trial judge's action in directing a verdict for the defendants other than Connell.

Jurisdiction was based on diversity of citizenship. Connell was a traveling salesman, who solicited orders in the Rocky Mountain area for the products of four clothing firms. On the evening of March 29, 1967, Connell was in Aspen, Colorado, and having completed his business calls for the day, he had dinner and then sought a place of lodging for the night. Finding lodging rooms to be expensive in Aspen, he decided to drive to Glenwood Springs to spend the night. On the way there he was involved in an automobile accident which resulted in serious injury to the plaintiff. The details of the accident are not important here, as the trial court directed a verdict against Connell on the issue of negligence, and that verdict is not questioned in this appeal.

After filing the original suit against Connell, the plaintiff amended her complaint to join as defendants four firms for whose goods Connell solicited orders. At trial plaintiff attempted to establish that at the time of the accident Connell was the servant of the four firms and was acting within the scope of his employment when the accident occurred. The evidence adduced on this issue consisted of answers to interrogatories submitted to the four firms, and the testimony of Connell. At the conclusion of the evidence, the trial judge directed a verdict in favor of the four manufacturing firms, and dismissed the complaint as to those four

defendants. Thereafter, a verdict having also been directed against Connell on the issue of negligence, the jury returned a verdict in favor of Dow and against Connell in the amount of $50,000.00 upon which the court entered judgment. Dow has appealed from the judgment of dismissal of all defendants except Connell, and from the final judgment entered on June 15, 1970.

In addition to urging that the complaint against the four manufacturing firms should not have been dismissed, plaintiff argues that the trial court erred in refusing to allow plaintiff's counsel to advise the jury of the amount demanded in the complaint and in refusing to submit the issue of exemplary damages to the jury. However, plaintiff has stipulated that these questions concerning damages need not be considered if this court affirms the dismissal of the complaint against the four manufacturing firms.

In examining the dismissal of the four manufacturers, it was said, on a motion for directed verdict, in Long v. Clinton Aviation Co., 180 F.2d 665 (10th Cir.):

> "... [T]he evidence and the inferences that may fairly be drawn therefrom must be considered in the light most favorable to the party against whom the motion is directed, and if the evidence and the inferences viewed in that manner are of such character that reasonable men in the exercise of fair and impartial judgment may reach different conclusions in relation to the critical issue, the motion should be denied and the issue submitted to the jury."

See also, Anderson v. Hudspeth Pine, Inc., 299 F.2d 874 (10th Cir.); Zelinger v. Uvalde Rock Asphalt Co., 316 F.2d 47 (10th Cir.).

It is plaintiff-appellant's contention, of course, that there is liability on the part of the four firms under the doctrine of respondeat superior. The four firms, on the other hand, argue that Connell was an independent contractor, and deny liability for his acts. By directing a verdict for the four firms, the trial court determined, in effect, that from the evidence presented reasonable men could not conclude otherwise than that Connell was an independent contractor. We agree. On the basis of the scant evidence on this question presented to the district court, if is clear that Connell was an independent contractor.

Connell solicited orders in the Rocky Mountain area for the merchandise of four firms, Karma Fashions, Edgar C. Hyman Co., Inc., Arnelle of California, and Shedrain Umbrella Company. He called on various retail merchants in his territory without generally reporting his activities to any of the four firms beyond submitting orders for merchandise when received. None of the firms had any control over his activities, although occasionally one of the firms would suggest potential customers. He was reimbursed on a straight commission basis, and he paid all of his own expenses. None of the four firms carried liability insurance, workmen's compensation insurance, or unemployment compensation insurance on him. There were no deductions from his compensation for social security or federal or state income tax. Although he carried business cards issued by the four firms, he paid for these himself. In short, the four firms did not exercise control over Connell's activities; he was not an employee, in the ordinary sense of the word, of any of the four defendant firms. See Dumont v. Teets, 262 P.2d 734 (Colo. 1953), and Sands v. Industrial Comm'n, 413 P.2d 702

(Colo. 1966). We agree with plaintiff that no single factor determines the existence of an employer-employee relationship, and that the totality of circumstances must be considered. The circumstances of this case leave no doubt that Connell was not an employee of any of the four defendant firms. Accordingly, the judgment of the trial court dismissing the complaint as to Karma, Arnelle, Shedrain, and Edgar C. Hyman Co. is hereby affirmed. At the request of plaintiff, we have refrained from examining the remaining issues in the case concerning damages.

AFFIRMED.

FILED
United States Court of Appeals
Tenth Circuit
AUG 3 1971

HOWARD K. PHILLIPS
Clerk